(2) Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

ULYSSES I & COMPANY, INC.,

Petitioner,

– against –

GARY FELDSTEIN and PETER MORTON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a conflict requiring resolution by this Court exists between the United States Court of Appeals for the Second Circuit, and the United States Courts of Appeals for the Sixth, Ninth and First Circuits, regarding the question of whether a federal court which lacks subject matter jurisdiction can nevertheless issue an injunction which affects the merits of a pending or future state court proceeding.

2. Whether a conflict requiring resolution by this Court exists between the United States Court of Appeals for the Second Circuit, and the United States Courts of Appeals for the Seventh and Sixth Circuits, regarding the question of whether federal courts should apply an exception to the *Rooker-Feldman* doctrine when the underlying state court judgment is the product of fraud, collusion or other wrongdoing.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Ulysses I & Company Inc. has no parent companies or non-wholly owned subsidiaries that need to be listed pursuant to Rule 29.6. Bridgewater Operating Corporation, captioned as a petitioner (although dropped from this action (though not the injunction) before the appeal to the Court of Appeals), also is a privately held corporation with no corporate parents.

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were Bridgewater Operating Corporation and Ulysses I & Company, Inc., Plaintiffs-Counter-Defendants-Appellants, Steven M. Cherniak and Charles Minch, Plaintiffs, Gary Feldstein, Stroock & Stroock & Lavan LLP., Kevin Smith, Joan Taverni, Decten Fund, L.P., Andrea Benko, Mara Gibbs, Errol Margolin, Edward P. Romaine, Patrick Aube, Richard Schneider, Kenneth Brown and Gerard Larsen, Defendants-Appellees, and Peter Morton, Defendant-Counter-Claimant-Appellee.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ulysses I and Company, Inc. ("Ulysses"), respectfully petitions the Court for a writ of certiorari to review the Memorandum and Order of the United States District Court for the Southern District of New York, dated August 8, 2002, the subsequent Judgment and Order of Permanent Injunction, entered on August 23, 2002, as affirmed by the Order of the United States Court of Appeals for the Second Circuit, filed on October 2, 2003, as well as the denial by the Court of Appeals of Ulysses' petition for panel rehearing and petition for rehearing en banc, filed on February 9, 2004.

OPINIONS BELOW

The denial of the petition for rehearing en banc is unreported and is reproduced in the Appendix at A-1. The Judgment of the Court of Appeals is reported at 346 F.3d 27 (2d Cir. 2003) and is reproduced in the Appendix at B-1. The Order of Permanent Injunction of the District Court is unreported and is reproduced in the Appendix at C-1. The Memorandum and Order of the District Court is unreported and reproduced in the Appendix at D-1.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Pursuant to Supreme Court Rule 13.3, this petition is filed within 90 days of the date of the denial by the Court of Appeals of Ulysses' petition for panel rehearing and petition for rehearing en banc, dated February 9, 2004.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1961, *et seq.*, and, in particular, 18 U.S.C. §§ 1962 (a) and (c) which state, in relevant part:

> a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of *section 2, title 18, United States Code*, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income,

in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

28 U.S.C. § 2283, which states, in relevant part:

to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 1651(a), which states, in relevant part:

[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

This case arises from the defendant's violations of the Racketeer Influenced & Corrupt Organizations Act ("RICO"), unjust enrichment and fraud.

Petitioner Ulysses I & Company, Inc. ("Ulysses") purchased certain residential property in August 1998, in East Hampton, New York, and duly recorded its deed. Ulysses, however, did not receive the property. Ulysses' complaint alleged that defendant Gary Feldstein ("Feldstein") created a RICO enterprise through which he conspired with others to, *inter alia,* corrupt the judicial process to fraudulently obtain a state court judgment awarding him the property.

By Memorandum and Order dated August 8, 2002, the United States District Court for the Southern District of New York granted Feldstein's motion to dismiss, based on the *Rooker-Feldman* doctrine and *res judicata*. The district court also issued a permanent injunction against Ulysses and specified related persons which (i) barred them from bringing any further federal actions related to the subject matter of the case without the district court's permission, and (ii) requiring them to file a disclosure statement with any state court filing relating to the subject matter of the case setting forth, *inter alia*, the district court's extremely critical characterizations of Ulysses, its principals, its complaint, its litigation history and other matters, including the district court's determination that Ulysses was a "serial litigator" with an "insatiable appetite for litigating" about the property at issue. The district court based its *Rooker-Feldman* dismissal on the disposition by summary judgment of a prior state court action awarding Feldstein specific performance on a competing contract of sale for the property, rejecting Ulysses' claim that *Rooker-Feldman* should not apply because the underlying state court judgment had been procured by fraud and other misconduct.

The United States Court of Appeals for the Second Circuit affirmed the district court's judgment. In its decision, the Court of Appeals held that, despite the fact that the district court lacked subject matter jurisdiction over the case, it

properly issued a permanent injunction which, *inter alia*, required Ulysses to attach the district court's Memorandum and Order to its filings in any state court action relating to the same subject matter as the district court action. That Memorandum and Order contains extremely negative characterizations of Ulysses, its litigation history and the character of its principals. It will therefore influence the merits of any pending or future state court proceeding in which it is filed.

The Court of Appeals' decision is in conflict with decisions issued by the United States Courts of Appeals for the Sixth, Ninth and First Circuits regarding the question of whether a federal court which lacks subject matter jurisdiction can nevertheless issue an injunction which affects the merits of a pending or future state court proceeding. That question is one of great importance to the relationship between this nation's federal and state court systems. The conflict between the Courts of Appeals regarding this issue requires resolution by this Court.

The Court of Appeals' decision also affirmed the district court's dismissal of Ulysses' complaint on the grounds that it lacked subject matter jurisdiction under *Rooker-Feldman*, despite the fact that Ulysses' complaint alleged that the state court judgment at issue had been procured through fraud and other wrongdoing. As a result, the Court of Appeals' decision is in conflict with decisions issued by the United States Courts of Appeals for the Seventh and Sixth Circuits, regarding the question of whether federal courts should apply an exception to the *Rooker-Feldman* doctrine when the underlying state court judgment is the product of fraud, collusion or other wrongdoing. This issue is one of great significance, as it relates to the federal courts' ability to exercise jurisdiction over matters that were previously the subject of litigation in state courts. The conflict between the Courts of Appeals regarding this issue requires resolution by this Court.

STATEMENT OF FACTS

A. *The Allegations In The Complaint*

The principal allegations in the operative complaint herein ("Comp."), relevant to this petition, are as follows:[1]

1. *Feldstein's Unlawful Occupancy of the East Hampton Property*

In May 1993, Jack Rounick ("Rounick"), who owned certain residential property in East Hampton, New York, entered into a Sales Contract with Gary Feldstein ("Feldstein"), who was occupying the property at the time as a tenant. The Sales Contract, as amended, provided for a closing on or before October 1, 1998. Feldstein was required to vacate the property if he did not close as scheduled and, conversely, had the right to accelerate the closing date and remain in occupancy if he made an advance payment of $1.1 million. JA. 1279-80 ¶¶ 6-8.

In June 1998, Feldstein informed Rounick that he was "having financial difficulties" and likely would not be able to purchase the property as scheduled. JA. 1280 ¶ 9. Rounick had postponed the closing date once before and was unwilling to do so again. Rounick, accordingly, looked for another buyer, while Feldstein looked for a solution to his lack of funds. *Id.*

2. *Feldstein's Looting of TPS*

Feldstein, a non-practicing physician, was the Chairman and Chief Executive Officer of Total Physician Services, Inc. ("TPS"), which was ostensibly engaged in the health care business in Manhattan, as well as in the States of Florida and California. TPS held itself out as specializing in the treatment of HIV/AIDS patients and was funded in large part through participation in Medicare and Medicaid. JA. 1280 ¶ 11.

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[1] The initial complaint was filed in April 2001. JA. 10-420. Ulysses filed an Amended Complaint (JA. 421-449) on October 10, 2001, and a Second Amended Complaint ("the Complaint") on November 21, 2001. JA. 1278-1443.

To meet his desperate need for funds to acquire the East Hampton property, Feldstein devised and executed a plan by which he would divert funds from TPS to purchase the property, JA. 1281 ¶ 12, and thus diverted to himself millions of dollars belonging to TPS and its creditors.

3. *Feldstein's Enlistment of Peter Morton in His Unlawful Scheme*

Notwithstanding Feldstein's looting of TPS, he was still uncertain that he could pocket enough of the stolen funds in time for the scheduled closing on the East Hampton property on October 1, 1998. Feldstein's only interest in acquiring the property was to "flip" it for a substantial profit, so he looked for a willing third party to whom he could illegally assign his purported rights and obligations under the Sales Contract. He found Peter Morton ("Morton"), a Las Vegas casino owner with a history of violations of the federal election laws. JA. 1286 ¶ 36.

On August 10, 1998, Feldstein entered into a certain Agreement to Assign and Assume (the "Assignment") with Morton. JA. 1286 ¶ 37. Morton agreed to pay Feldstein $9.7 million. A few days after entering into the Assignment, Feldstein requested Rounick's consent, which Rounick denied. JA. 1287 ¶ 38. Feldstein then insisted that Rounick "discount" the purchase price, which Rounick also refused. *Id.* Nevertheless, by letter dated August 20, 1998, Feldstein informed Rounick, in blatant breach of their Sales Contract and in violation of New York law, that he intended to proceed with the Assignment and/or discounted purchase price anyway. JA. 1287 ¶ 39.

4. *Ulysses' Purchase of the Premises*

By reason of Feldstein's new and grossly inequitable demands, Rounick determined that Feldstein had renounced the Sales Contract and forfeited any remaining rights thereunder. JA. 1288 ¶ 43. Accordingly, on August 25, 1998, Rounick sold the Premises to Ulysses, for the sum of

$4,925,000 (approximately the same amount that would have remained due from Feldstein under the Sales Contract). JA. 1288 ¶ 44.

5. *The County Clerk's Unlawful Participation in the Scheme*

In furtherance of his unlawful scheme, Feldstein also enlisted the assistance of the Suffolk County Clerk, Edward P. Romaine ("Romaine"), who advanced the scheme in several key respects.

Feldstein commenced his action against Ulysses in Supreme Court, Suffolk County, to enforce his Sales Contract (the "State Action") on or about August 31, 1998.

On January 31, 2000, Justice Gerard D'Emilio, Supreme Court, Suffolk County, issued a decision and order granting Feldstein's motion for summary judgment on his claim for specific performance on his Sales Contract (the "January 31 Decision and Judgment"). Justice D'Emilio based his decision on his finding, contrary to law and fact, that Feldstein had shown, solely on the basis of bogus account statements, that he was "ready, willing and able" to close on the Premises in September 1998.

In the January 31 Decision and Judgment, Justice D'Emilio did not make any provision for transfer of title in the Premises to Feldstein. He did, however, expressly state therein that it was to be entered as the decision and judgment of the Court. JA. 1296 ¶ 76. Romaine, however, did not do so.

After the January 31 Decision and Judgment was issued by Justice D'Emilio, Feldstein's counsel, Kevin Smith ("Smith"), spoke on the phone *ex parte* with Justice D'Emilio's law clerk, Gary Brunjes, and with Romaine. They agreed among themselves, all without Ulysses' knowledge, that, despite the explicit direction of the Court that the January 31 decision be entered as the judgment, Romaine would not do so but rather would substitute a new judgment to be prepared by Smith. Smith has admitted this. JA. 1296 ¶ 77.

Thus, in clear violation of due process, Smith prepared and Romaine entered a new judgment, dated February 7, 2000 (the "February 7 Judgment"), without motion, *without notice*, and without any opportunity for Ulysses to submit its own proposed judgment.

The February 7 Judgment prepared by Feldstein's counsel was much more to Feldstein's liking in that, unlike the January 31 Decision and Judgment, it included a direction that title to the property be conveyed to him by a date certain, *i.e.*, March 10, 2000, and that if Ulysses failed to do so, a deed for the property would be executed in Feldstein's name by the Suffolk County Sheriff, and Ulysses would be held in contempt. JA. 1297 ¶ 79.

Remarkably, the version of the February 7 judgment on file (JA. 313) shows traces of Romaine's handwritten signature in red ink below that which purports to be Judge D'Emilio's signature, although this does not appear in the version (JA. 318) served on Ulysses with Notice of Entry. JA. 1416-18. Instead, Smith served a different, sanitized version with difference filing stamps and a single signature (ostensibly the judge's). This sanitized version was then falsely certified by Romaine as the judgment on file. JA. 1297 ¶¶ 80-81, JA. 1419-22.

That the February 7 Judgment was altered and tampered with is again confirmed by expert testimony. JA. 1297 ¶ 82, A. 1358. Not surprisingly, in June 2000 the entire file in the State Court Action was subpoenaed from Romaine's office by the FBI for presentment to a grand jury. JA. 1298 ¶ 83, JA. 319.

In April 2001, Ulysses moved in state court to vacate the February 7 Judgment on the ground of "fraud, misrepresentation or misconduct of an adverse party." By Order dated May 14, 2001, Justice Jones granted the motion and vacated the February 7 Judgment. JA. 1298 ¶ 85. Feldstein moved for reargument, and, inexplicably, by Order dated October 2, 2001, Justice Jones reversed himself and reinstated the

February 7 Judgment, albeit without in any way disturbing his finding of misconduct. JA. 1298 ¶ 86.

6. *The Unlawful Transfer of Title to Feldstein and Morton*

On October 3, 2001, following Justice Jones' reinstatement of the February 7, 2000 Judgment, the Sheriff of Suffolk County executed a deed for the property in favor of Feldstein and thereby illegally purported to transfer title from Ulysses to Feldstein. JA. 1298 ¶ 87, JA. 1413.

On October 10, 2001, Romaine recorded the deed to the property in Feldstein's name. That same day, Romaine recorded a second deed, purporting to convey the property from Feldstein to Morton. The deed amount on Morton's deed was $9,994,769.51. Feldstein thus realized a very handsome profit from his fraud. JA. 1299 ¶ 89.

B. *Prior Litigation*

1. *Feldstein's State Court Action for Specific Performance*

The February 7, 2000 state court judgment awarded Feldstein specific performance on his Sales Contract with Rounick. Upon Ulysses' appeal, the Appellate Division, Second Department, affirmed, stating that the "record demonstrates, as a matter of law, that the plaintiff buyer was ready, willing, and able to perform his obligations under the contract, even though his tender of performance was excused by the defendant seller's anticipatory breach." *Feldstein v. Rounick*, 276 A.D.2d 523, 714 N.Y.S.2d 689, 690 (App. Div. 2000). The New York Court of Appeals declined to hear an appeal. *Feldstein v. Rounick*, 95 N.Y.2d 955, 722 N.Y.S.2d 469 (2000).

On June 10, 2002, the Appellate Division, Second Department, affirmed Justice Jones' October 2, 2001 Order by which he reinstated the February 7 Judgment following his order of vacatur. *Feldstein v. Rounick*, 295 A.D.2d 398, 743 N.Y.S.2d 735 (App. Div. 2002). Ulysses' application for leave to appeal to the Court of Appeals was denied.

2. *The Eastern District Action*

In June 1999, Ulysses filed an action against Morton in the United States District Court for the Eastern District of New York (the "Eastern District action"). JA. 1966, alleging, *inter alia*, violations of 42 U.S.C. § 1983 by state and local government officials in depriving Ulysses of its property rights, intentional interference with quiet enjoyment of property, intentional interference with contractual relations, conversion, and slander of title. JA. 1967. The Eastern District suit sought damages and a declaratory judgment that Ulysses was the rightful owner of the property. *Id.*

The district court dismissed for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine, finding that the action was an impermissible attack on the state court judgment. *Id.* The Court also held that collateral estoppel applied. JA. 1968. The United States Court of Appeals for the Second Circuit affirmed, solely on the grounds of *Rooker-Feldman*, 11 Fed. Appx. 14 (2d Cir. 2001), and this Court denied certiorari, 534 U.S. 992, 122 S. Ct. 458 (2001).

C. *The Present Action*

Ulysses, along with Bridgewater, filed the present action in April 2001. On August 8, 2002, Judge Preska issued a Memorandum, and on August 23, 2002 entered Judgment, granting Feldstein's motion to dismiss the Second Amended Complaint under F.R.C.P. 12(b)(6), and imposing a permanent injunction against Ulysses.

The district court held that it had no jurisdiction over the action in light of the *Rooker-Feldman* doctrine. The district court held that this action was "inextricably intertwined" with the prior state court proceeding to determine the owner of the property. JA. 1980. The district court rejected Ulysses' argument that the alleged corruption of the state court process spared this case from *Rooker-Feldman*, finding that there is no "blanket fraud" exception to *Rooker-Feldman* . . . ." JA. 1981.

The district court alternatively held that the action was barred by *res judicata*, relying *not* on the prior state court action, but on the Eastern District action. Judge Preska ruled that even though Ulysses had *not* asserted the instant claims in the Eastern District action — which action was dismissed for lack of jurisdiction — that argument would "miss the point." JA. 1984. She found it sufficient that "Feldstein's alleged wrongdoing *could have been addressed* in the Eastern District action." JA. 1985 (emphasis added).

Finally, the district court granted an injunction (i) barring Ulysses, Bridgewater and various individuals (owners or officers of those companies) from filing any further federal court actions involving the East Hampton property without her specific permission, and (ii) requiring that in filing any state court action directly or indirectly involving the premises, Ulysses and the individuals must provide the state court with an "informational statement" including, *inter alia*, a copy of her decision.

In purported support of the injunction, Judge Preska found "a history of duplicative litigation with respect to ownership of the Premises — although, admittedly, Ulysses seeks monetary damages in this case rather than ownership." JA. 1989. Judge Preska determined, without allowing any discovery and without any examination of the merits, that "Ulysses cannot have had a good faith expectation of prevailing in this case," *id.* and that "it does not appear that any other sanction short of an injunction will be adequate to protect the courts and other parties from Ulysses' insatiable appetite for litigating about the Premises." *Id.*

On October 2, 2003, the United States Court of Appeals for the Second Circuit affirmed Judge Preska's (i) opinion that the District Court lacked jurisdiction over the plaintiffs' claims under the *Rooker-Feldman* doctrine and (ii) imposition of a permanent injunction restricting plaintiffs' ability to initiate future federal litigation concerning the Premises, and requiring that plaintiffs append the District Court's opinion and order of injunction to future filings in state courts.

On February 9, 2004, the Second Circuit denied Ulysses' petition for panel rehearing and petition for rehearing en banc.

ARGUMENT I

CERTIORARI SHOULD BE GRANTED, BECAUSE THE SECOND CIRCUIT COURT OF APPEALS, IN CONFLICT WITH THE SIXTH, NINTH AND FIRST CIRCUIT COURTS OF APPEALS, HAS DECIDED THAT, EVEN IN THE ABSENCE OF SUBJECT MATTER JURISDICTION, A FEDERAL COURT MAY STILL ISSUE AN INJUNCTION AFFECTING THE MERITS OF A STATE COURT ACTION

This Court should grant *certiorari*, because the federal judicial circuits are presently split on the issue of whether a federal court, without exercising subject matter jurisdiction over a case, can still issue an injunction which affects, or will affect, the merits of a state court action.

Rule 10(a) of this Court provides that one of the considerations for review on *certiorari* is the fact that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."

That is precisely what has happened here. As set forth below, the decision herein by the United States Court of Appeals for the Second Circuit provides that a federal district court, in the course of dismissing an action for lack of subject matter jurisdiction, may nevertheless issue an injunction affecting the merits of a pending or future state court proceeding. This decision is in conflict with decisions issued by the Courts of Appeals for the Sixth, Ninth and First Circuits, and therefore merits review on *certiorari* by this Court.

The issue involved is one of great importance to the relationship between this nation's federal and state court systems. When a federal court continues to exercise its judicial power over the parties in the absence of subject matter jurisdiction, it tests the limits of the powers granted to the federal courts

by Article III of the Constitution. When the same court then issues an injunction affecting the merits of a state court action it has (as the Sixth, Ninth and First Circuits have decided), impermissibly exceeded the constitutional limits on its power.

In this action, the United States District Court for the Southern District of New York dismissed Ulysses' complaint for lack of subject matter jurisdiction pursuant to the *Rooker-Feldman* doctrine and issued a permanent injunction directing, *inter alia*, that:

> Ulysses, and any of its shareholders, directors, or officers, or any individual, entity or affiliate acting for it, at its behest, or in concert with it, including but not limited to Bridgewater, Solow, Schlesinger and Cherniak, shall not intervene in a pending action or proceeding, make any motions therein, or file or attempt to initiate any new action or proceeding in any state, county, municipal or other non-federal (i) court, (ii) agency, (iii) tribunal, (iv) committee or other forum in the United States against Feldstein, his spouse, his successors and assigns, Medical Care Services of Manhattan, P.C., Decten, Taverni, Romaine and/or Morton that is in any way, directly or indirectly, connected with or related to the Premises, without appending to the first paper served on each defendant and the first paper filed or docketed a statement entitled "Informational Statement Concerning Litigation History of Ulysses I & Co. Pursuant to court Order." To this statement shall be attached (a) a copy of the Memorandum and Order of this Court, dated August 8, 2002, and (b) a copy of this instant Judgment and Order of Permanent Injunction.
>
> The Court further ordered that:
>
> Failure to comply with the terms of this Judgment and Order of Permanent Injunction shall subject Ulysses and any of its shareholders, directors, officers or any other individual or entity acting for it, at his behest, or in concert with it, or at its direction or instigation, including

but not limited to Bridgewater, Solow, Schlesinger and Cherniak, to applicable penalties for contempt of court, including fine or imprisonment or both . . .

This injunction, which the Court of Appeals then affirmed, was intended to, and will, affect the merits of any state court proceeding covered by its terms.

As set forth above, the injunction mandates that Ulysses attach to any state court filing an "Informational Statement Concerning Litigation History of Ulysses I & Co. Pursuant to Court Order," containing a copy of the district court's Memorandum and Order and the Injunction itself.

Significantly, the Memorandum and Order contains many statements that are extremely critical of Ulysses, its principals, its complaint, its litigation history and other matters, including, *inter alia*, the following:

- "This litigation has a long and sordid history." (D-4)
- "Ulysses has a history of duplicative litigation with respect to ownership of the Premises." (D-35)
- "Ulysses cannot have had an objective good faith expectation of prevailing in this case." (D-35)
- "Ulysses has caused needless expense to Feldstein and continues to burden unnecessarily numerous courts and their personnel across the nation . . ." (D-36)
- "[I]t does not appear that any other sanction short of an injunction will be adequate to protect the courts and other parties from Ulysses' insatiable appetite for litigating about the Premises." (D-36)
- "Feldstein's alleged miscalculation is unrelated to Ulysses' status as a serial litigator with respect to the Premises." (D-40)
- "Ulysses has had so many bites at the apple, it has swallowed the core." (D-45)

The injunction further provides that any violation of its terms will be punishable by contempt of court, including criminal contempt sanctions.

This injunction was clearly intended to affect the merits of state court proceedings. By requiring, under penalty of criminal contempt, that a state court be presented with the district court's highly negative characterizations of a party, its complaint, its litigation history and the character of its principals, this injunction sends a strong and unambiguous signal to state courts that any motion or action filed by Ulysses is without merit. The injunction applies to both pending and future state court proceedings, in which any claim, including a claim which has not yet arisen (and cannot be foreseen), is asserted.

As a result, it is clear that this injunction will brand Ulysses as a "serial litigator" with an "insatiable appetite" for litigation. It is difficult to imagine a circumstance in which a state court reading such statements would, or could, fail to be influenced by them. That influence, in turn, will affect the merits of any such pending or future state court proceeding.

Despite the nature of the injunction, and its intended effect on state courts, the Court of Appeals for the Second Circuit held as follows:

> Plaintiffs argue that the District Court lacked the power to enjoin them from filing future lawsuits after the Court found that it lacked subject matter jurisdiction over the substance of their claims pursuant to the *Rooker-Feldman* doctrine. We reject this argument because it is undermined by Supreme Court precedent. see *Willy v. Coastal Corp.*, 503 U.S. 131. 138, 112 S.Ct. 1076, 117 L.Ed.2d 280 (1992) (holding that whether an attorney had 'abused the judicial process,' and whether sanctions were warranted under Rule 11, were approximately considered after dismissal for lack of subject matter jurisdiction, because such determinations "do[ ] not signify a district court's assessment of the legal merits of the complaint" (quoting *Cooter & Gell v. Hartmarx Corp.*,

> 496 U.S. 384, 395-96, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (internal quotation marks omitted))); by the law of our Circuit, *see Perpetual Sec., Inc. v. Tang*, 290 F.3d 132, 141 (2d Cir. 2002) ("Although the district court lacked jurisdiction to decide the merits of the underlying action, it retained the power to determine collateral issues, such as the appropriateness of sanctions." (citing *Willy*, 503 U.S. at 137-39, 112 S.Ct. 1076)); and by statute, *see, e.g.*, 28 U.S.C. § 1919 (providing that "[w]henever any action or suit is dismissed in any district court . . . for want of jurisdiction, such court may order the payment of just costs"), all of which permit the imposition of appropriate sanctions following dismissal for lack of subject matter jurisdiction.

As a result, Second Circuit law provides that a federal court, in the absence of subject matter jurisdiction, may issue an injunction affecting the merits of both pending and future state court proceedings.

In so holding, the Court of Appeals did not, because it could not, rely on any statute or applicable judicial decision which provides that a federal court without subject matter jurisdiction may issue a ruling affecting the merits of a state court proceeding. Unlike the injunction herein, the cases referred to above cited by the Court of Appeals in support of its holding all relate to the power of the federal courts to impose sanctions in cases dismissed for lack of subject matter jurisdiction. None of those sanctions was intended to affect the merits of a pending or future state court proceeding. *See also Safir v. United States Lines, Inc.*, 792 F. 2d 19, 24 (2d Cir. 1986); *In re Martin-Trigona*, 737 F.2d 1254, 1261-62 (2d Cir. 1984).

In conflict with this holding in the Second Circuit, the United States Court of Appeals for the Third Circuit has held that "[i]f a court . . . determines that it lacks subject matter jurisdiction, it cannot decide the case on the merits. It has no authority to do so. A federal court can only exercise that power granted to it by Article III of the Constitution and by the statutes enacted pursuant to Article III." *In re Orthopedic*

"Bone Screw" Products Liability Litigation, 132 F.3d 152 (3rd Cir. 1997).

Neither the Anti-Injunction Act, codified at 28 U.S.C. § 2283, nor the All Writs Act, 28 U.S.C. § 1651(a), gives a federal court the power to issue a decision affecting the merits of a state court proceeding when it lacks subject matter jurisdiction over a case.[2]

Neither of these statutes did, or could, provide support for the decision of the Court of Appeals herein. The Court affirmed an injunction which affected, and will continue to affect, the merits of state court proceedings despite the fact that the Court was without any jurisdictional basis to issue such an order. In so doing, the Court ignored the fundamental legal tenet that subject matter jurisdiction is not a "nicety of legal metaphysics," but rests instead on "the central principle in a free society that courts have finite bounds of authority." *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 108 S.Ct. 2268 (1988).

It is this principle, which the Second Circuit has chosen to ignore, that has been recognized and endorsed in the Sixth, Ninth and First Circuits. In fact, the Courts of Appeals in those circuits have held that Article III of the Constitution

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[2] The Anti-Injunction Act prohibits a federal court from issuing injunctions "to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. This Court has held that this prohibition extends to indirect injunctions against parties. *Atl. Coast Line Ry. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970) ("It is settled that the prohibition of Section 2283 cannot be evaded by addressing the order to the parties or prohibiting utilization of th results of a completed state proceeding."). This Court has also held that "proceedings" for the purposes of the Act include "all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process." *Hill v. Martin*, 296 U.S. 393, 403 (1935).

The All Writs Act, 28 U.S.C. § 1651(a), provides, in relevant part, that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

does not confer the authority to issue decisions affecting the merits of a case to a federal court without subject matter jurisdiction over a case.

In circumstances remarkably similar to those herein, the United States Court of Appeals for the Sixth Circuit has held that "[w]here a district court dismisses a case for lack of jurisdiction, it does not have the authority, either inherently or under the All Writs Act, to enjoin actions by the parties in the state courts or state administrative proceedings." *Tropf v. Fidelity National Title Insurance Company*, 289 F.3d 929, 942 (6th Cir. 2002).

The injunction reversed in *Tropf*, like the injunction affirmed herein, imposed pre-filing requirements on the plaintiffs in the event that they filed further state court actions or state administrative proceedings:

> The district court also enjoined the Tropfs from filing "any civil lawsuit in any state court or administrative proceeding alleging or asserting a factual or legal claim based upon or arising out of any of the legal or factual claims alleged in these actions" against the federal defendants without first posting a surety bond or cash in the amount of $50,000.

Id. at 941.

Also in *Tropf*, as in the present action, the district court's injunction was issued after the plaintiffs lost title to a disputed parcel of real property, after they were repeatedly denied relief by the "five separate state courts," and after they filed a federal action alleging, *inter alia*, RICO claims against the defendants. *Id.* at 931.

The Court of Appeals in *Tropf* held that the district court had properly: (i) dismissed the plaintiffs' complaint on the ground that "it lacked subject matter jurisdiction under the *Rooker-Feldman* abstention doctrine because '[c]learly, Plaintiffs' complaints amount to nothing more than a challenge to various state-court judgments against them", (ii) imposed monetary sanctions on the plaintiffs and their counsel and (iii) issued an injunction barring the plaintiffs from filing

further claims regarding the same matters in *federal* court without first seeking permission from the district court. *Id.* at 937.

However, noting that "this circuit has not addressed whether a district court can impose prefiling requirements on parties in state courts and state administrative proceedings," the Court of Appeals in *Tropf* held that:

> [T]he district court's April 5, 2000 injunction requiring the Tropfs to post a $50,000 bond or cash before filing a civil lawsuit in any state court or state administrative proceeding was an abuse of discretion as it applies to future filings of the Tropfs. Where a district court dismisses a case for lack of jurisdiction, it does not have the authority, either inherently or under the All Writs Act, to enjoin actions by the parties in the state courts or state administrative proceedings . . .
>
> Because the district court did not have subject matter jurisdiction over the Tropfs' claims and did not adjudicate them on the merits, the court should not have enjoined the Tropfs from filing any civil lawsuit in the state courts or in state administrative proceedings without posting a bond or cash. The state courts have the full power to decide how to handle any further litigation in state court involving this protracted matter.

Id. at 942-43.

The *Tropf* court explained its conclusion that requiring a party to post a bond or cash before filing a state court action was not permissible under the All Writs Act, by stating that: "[T]he All Writs Act only authorizes the issuance of writs 'in aid of . . . jurisdiction [ ].' . . . federal courts must have an independent basis for subject matter jurisdiction in order to issue a writ in aid of such jurisdiction." *Id.* at 943.

The Court held that because the district court dismissed for lack of subject matter jurisdiction, none of the exceptions to the Anti-Injunction Act applied:

> First, there is no statute that particularly authorizes the federal courts to issue injunctions in the circumstances of this case. Second, the injunction could not have been issued in aid of the district court's jurisdiction over the Tropfs' claims. Finally . . . [b]ecause the district court abstained on *Rooker-Feldman* grounds, the injunction cannot have been issued to prevent the state courts from litigating issues decided in federal court.

Id. at 942, n.21.

The *Tropf* decision reveals that the law in the Sixth Circuit on this important issue is in direct conflict with the law in the Second Circuit. In *Tropf* and in *Bridgewater*, a district court dismissed RICO claims relating to hotly disputed real estate transactions that had been extensively litigated in state court. In both cases, the district court issued an injunction containing pre-filing requirements affecting a party's ability to pursue their claims in state court. In *Tropf*, that requirement was the posting of a bond or cash in the amount of $50,000. In *Bridgewater*, the requirement was that Ulysses attach copies of the district court's decision and injunction to any state court filing. Both requirements affect the enjoined party's ability to pursue the merits of their claims in state court. The United States Court of Appeals for the Sixth Circuit properly held that a federal court which dismisses a complaint for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine lacks the power to enjoin the plaintiff from freely pursuing claims in state court. The United States Court of Appeals for the Second Circuit, in conflict with the Sixth Circuit, held that the district court did not lack this power.

The decision of the United States Court of Appeals for the Ninth Circuit, in *Cook v. Peter Kiewit Sons Co., et al.*, 775 F.2d 1030 (9th Cir. 1985), is also in conflict with the decision herein in the Second Circuit. In *Cook*, the Court reversed a district court's injunction against "repetitive and vexatious litigation" on the grounds that a district court without subject matter jurisdiction did not have the power to issue such an injunction.

Plaintiff Cook originally sued his employer and others in California state court, challenging the withholding of federal income taxes from his wages. After that case was dismissed, Cook filed a complaint in the United States District Court for the Eastern District of California, realleging his state court claims and adding claims against additional defendants, including the state court judge and the local county clerk. Before the district court ruled on the defendants' motions to dismiss, Cook filed a second federal action, repeating the claims in his first action and adding still more defendants. *Id.* at 1033.

The district court in *Cook* dismissed the second federal complaint under the substantiality doctrine, finding "that 'this lawsuit [was] wholly frivolous, insubstantial and groundless,' and concluded that the lawsuit '[was] outside this court's subject matter jurisdiction." *Id.* at 1033. The district court further held that Cook had brought the action "in bad faith and for vexatious purposes," and, relying upon the All Writs Act, "enjoined Cook from again adjudicating any claim based on the same facts as those contended in" either the state or federal cases. *Id.* The district court's injunction applied equally to federal and state actions.

The Court of Appeals for the Ninth Circuit reversed. It held that the "dismissal for lack of subject matter jurisdiction, thus, is not a judgment on the merits, and [the district court] retained no power to make judgment relating to the merits of the case." Significantly, it also held that the All Writs Act "requires that an injunction be issued in aid of the court's jurisdiction. Because Judge Ramirez concluded that the court lacked subject matter jurisdiction, he did not reach a judgment on the merits and did not retain the necessary authority to issue an injunction against repetitive litigation . . ." *Id.* at 1035-36.

The Ninth Circuit decision in *Cook* places it in clear conflict with the Second Circuit, in light of the holding herein that a court lacking any basis for subject matter jurisdiction can still issue an injunction intended to prevent "serial" litigation.

Finally, the United States Court of Appeals for the First Circuit has also held, in conformity with the Sixth and Ninth Circuits, that a federal court without subject matter jurisdiction lacks the power to issue an injunction that restrains a litigant's rights in a related state court action.

In *Christopher v. Stanley-Bostich, Inc.*, 240 F.3d 95 (1st Cir. 2001), the Court held that "orders relating to the merits of an underlying action are void if issued without subject matter jurisdiction." *Id.* at *6. The plaintiff had filed a products liability action in Massachusetts state court. The defendant, a nail gun manufacturer, removed the action to the United States District Court for the District of Massachusetts. The plaintiff moved to remand the case, arguing that the amount in controversy did not meet the jurisdictional minimum of $75,000, based in part on his representation to the federal court that the state court had made a factual determination that the plaintiff's damages could not exceed $25,000.

The district court remanded the action, but ordered that "[t]he plaintiff, due to the position he has asserted herein, is judicially estopped from recovering more than $75,000 in this action."

On appeal of the remand order, the Court of Appeals held that:

> having determined that it lacked subject matter jurisdiction over the case, the court lacked authority to make the estoppel determination. Indeed, it impermissibly intruded into a matter properly left to the state courts. The decision to remand the case to state court reflected the district court's conclusion that it lacked subject matter jurisdiction over the case. When a federal court concludes that it lacks subject matter jurisdiction over a case, it is precluded from rendering any judgments on the merits of the case.

Id. at *5.

Restraining Christopher from recovering more than $75,000 in state court clearly hampered his ability to pursue his claims in state court. So does the injunction affirmed by

the Court of Appeals for the Second Circuit herein. The First Circuit concluded that a federal court that is without subject matter jurisdiction cannot issue such an order. The Second Circuit reached the opposite conclusion.

As set forth above, there is a clear conflict between the Second Circuit and the Sixth, Ninth and First Circuits regarding the question of whether a federal court which lacks subject matter jurisdiction can nevertheless issue an injunction which affects the merits of a pending or future state court proceeding. This conflict can, and should, be resolved by this Court, and for that reason, this Court should grant the instant petition for *certiorari*.

ARGUMENT II

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT COURT OF APPEALS, IN CONFLICT WITH THE SIXTH AND SEVENTH CIRCUIT COURTS OF APPEALS, HAS DECIDED THAT THE *ROOKER-FELDMAN* DOCTRINE REQUIRES DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION EVEN WHERE IT IS SHOWN THAT THE STATE COURT JUDGMENT WAS THE PRODUCT OF CORRUPTION IN THE STATE ADJUDICATORY PROCESS

The federal judicial circuits are split on the issue of whether the *Rooker-Feldman* doctrine applies if the state court decision at issue is the product of corruption in the state adjudicatory process.

The Sixth and Seventh Circuits apply such an exception, while the Second Circuit does not. The issue is one of great significance, as it relates to the federal courts' ability to exercise jurisdiction over matters that were previously the subject of litigation in state courts, and thereby implicates important issues of federalism and comity.

Under the *Rooker-Feldman* doctrine, lower federal courts lack subject matter jurisdiction over claims that effectively challenge state court judgments. *See D.C. Court of Appeals v.*

Feldman, 460 U.S. 462, 486-87, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S.Ct. 149, 68 L.Ed. 362 (1923). The doctrine reflects the principle set forth in 28 U.S.C. § 1257 that the Supreme Court is the only federal court that has jurisdiction to review state court judgments, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 622, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989), unless otherwise provided by Congress, *see, e.g.*, 28 U.S.C. § 2254 (habeas corpus review).

Here, Ulysses made a compelling showing in its federal complaint that the state court judgment was procured through political corruption and fraud. Nevertheless, the Court of Appeals affirmed the district court's dismissal of the complaint based on *Rooker-Feldman*, holding that "[w]e agree with the District Court that it lacked jurisdiction to adjudicate the claims raised in this action because they are 'inextricably intertwined' with issues settled by the state court action that originally adjudicated the parties' rights to the property." *Bridgewater*, 346 F.3d at 30.

The *Bridgewater* district court applied *Rooker-Feldman* in reliance on a judgment issued by the Supreme Court of the State of New York — the disposition by summary judgment of an action brought by Feldstein against Ulysses, awarding Feldstein specific performance on a competing contract of sale for the East Hampton property. However, Ulysses' federal court complaint clearly alleged that defendant Feldstein had created a RICO enterprise through which he conspired with others to, *inter alia*, corrupt the judicial process so as to fraudulently obtain a state court judgment awarding him the property.

Specifically, Ulysses' complaint alleged that:

- On January 31, 2000, Justice Gerard D'Emilio of the New York State, Supreme Court, Suffolk County, issued a decision and order granting Feldstein's motion for summary judgment on his claim for specific performance on his Sales Contract ("January 31 Decision and Judgment"). Justice D'Emilio based

his decision on his finding that Feldstein had shown that he was "ready, willing and able" to close on the Premises in September 1998.

- In the January 31 Decision and Judgment, Justice D'Emilio did not make any provision for transfer of title in the Premises to Feldstein, He did, however, expressly state therein that it was to be entered as the decision and judgment of the Court. JA. 1296 ¶ 76. The Suffolk County Clerk, Romaine, however, did not do so.
- After the January 31 Decision and Judgment was issued by Justice D'Emilio, Feldstein's counsel, Kevin Smith ("Smith"), spoke *ex parte* to Justice D'Emilio's law clerk and with Romaine. They agreed among themselves, all without Ulysses' knowledge, that, despite the explicit direction of the Court that the January 31 Decision be entered as the judgment, Romaine would not do so, but rather would substitute a new judgment to be prepared by Smith. Smith has admitted this. JA. 1296 ¶ 77.
- Thus, without notice to Ulysses, Smith prepared and Romaine entered a new judgment, dated February 7, 2000 ("February 7 Judgment").
- The February 7 Judgment prepared by Feldstein's counsel included a direction that title to the property be conveyed to him by a date certain, *i.e.*, March 10, 2000, and that if Ulysses failed to do so, a deed for the property would be executed in Feldstein's name by the Suffolk County Sheriff, and Ulysses would be held in contempt. JA. 1297 ¶ 79.
- The version of the February 7 "judgment" on file (JA. 313) shows traces of Romaine's handwritten signature in red ink below what purports to be Judge Emilio's signature, although this does not appear in the version (JA. 318) served on Ulysses with Notice of Entry. JA. 1416-18. Instead, Smith served a different, sanitized version with different filing stamps

and a single signature (ostensibly the judge's). This sanitized version was then falsely certified by Romaine as the judgment on file. JA. 1297 ¶¶ 80-81, JA. 1419-22.

- That the February 7 Judgment was altered and tampered with is again confirmed by expert testimony. JA. 1297 § 82, JA. 1358.
- In April 2001, Ulysses moved in state court to vacate the February 7 Judgment under CPLR 5015(a)(3) on the ground of "fraud, misrepresentation or misconduct of an adverse party." By Order dated May 14, 2001, Justice Jones granted the motion and vacated the February 7 Judgment because it was issued *ex parte*. JA. 1298 ¶ 85. Feldstein moved for reargument, and by Order dated October 2, 2001, Justice Jones reinstated the February 7 Judgment, albeit without in any way disturbing his finding of misconduct. JA. 1298 ¶ 86.
- In June 2000 the entire file in the State Court Action was subpoenaed from Romaine's office by the FBI for presentment to a grand jury. JA. 1298 ¶83, JA. 319.

Despite these facts, the district court held that *Rooker-Feldman* barred Ulysses' federal claims, "because they are 'inextricably intertwined' with the Suffolk County Judgment," and that the complaint should therefore be dismissed for lack of subject matter jurisdiction. (D-25)

While Ulysses alleged that the state court judgment had been obtained through fraud and political corruption, the district court held that there was no exception: "The Court of Appeals has held, however that it has 'never recognized a blanket fraud exception to *Rooker-Feldman*." *Id.* at [D-27] (citations omitted).

The Court of Appeals for the Second Circuit affirmed, without specifically addressing the issue of the fraud exception rejected by the district court. However, the district court had indeed followed the prevailing law in the Second Circuit,

which has repeatedly rejected any exception to *Rooker-Feldman* based on fraud or corruption in the issuance of a state court decision, despite the fact that other circuits have applied such an exception.

In fact, in a recent summary order, the Court of Appeals for the Second Circuit noted the existence of a split between the federal judicial circuits on the issue of a fraud exception to the *Rooker-Feldman* doctrine. *In re Salem*, 2004 WL 759516 (2d Cir., April 8, 2004) (noting that "the circuits are split on th[e] issue" of whether "to recognize an exception to the *Rooker-Feldman* doctrine where the underlying state court judgment is void for fraud or lack of jurisdiction . . .").[3]

In *Johnson v. Smithsonian Institution*, 189 F.3d 180, 186 (2d Cir. 1999), the Court of Appeals for the Second Circuit observed that "[t]his court has never recognized a blanket fraud exception to *Rooker-Feldman*." In doing so, the Court affirmed the dismissal of a complaint filed by an artist's heirs seeking the return from a museum of works created by the artist. The Court relied on the *Rooker-Feldman* doctrine, holding that the plaintiffs' claims were "inextricably intertwined" with an earlier state court order which determined that the artwork had been legally abandoned. The district court had rejected the plaintiffs' contention that the state court judgment had been procured by fraud and could therefore not form a basis for the application of *Rooker-Feldman*. The Second Circuit ruled that:

> The plaintiff contends that this case is not subject to the *Rooker-Feldman* bar because the [state court] order was fraudulently obtained. We disagree. This Court has never recognized a blanket fraud exception to *Rooker-Feldman* . . . . Here, the plaintiff seeks in effect to set aside the state court's order. That he cannot do in a federal district court.

Id. at 186-87.

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[3] The summary order in *In re Salem* specifically provides that it is not to be cited as precedential authority, and we do not do so here.

Similarly, in *Kropelnicki v. Siegel*, 290 F.3d 118 (2d Cir. 2002), the Court of Appeals for the Second Circuit rejected the appellant's claim that *Rooker-Feldman* should not bar her challenge to a state court judgment on the ground that the state court judgment had been procured through her adversaries' misrepresentations. The Court held that her "claim sounds in fraud, yet we have 'never recognized a blanket fraud exception to *Rooker-Feldman*'." *Id.* at 128; (citing Johnson, 189 F.3d at 186-87.) Decisions by federal district courts in the Southern and Eastern Districts of New York make it clear that no fraud exception to *Rooker-Feldman*, much less a "blanket" exception, exists in the Second Circuit. *See Azumendi v. Roth*, No. 99 Civ. 3663 (WK) (DF), 2002 WL 441283, at *10 (S.D.N.Y. Mar. 20, 2002) (plaintiff's allegations of fraud against defendants, *i.e.*, that "defendants falsely created appearance that decedent lived in New York" and that the Surrogate's Court "fraudulently acquired jurisdiction over decedent's estate," did not preclude dismissal under *Rooker-Feldman*); *Bell v. State*, No. 99 Civ. 5809 (AGS), 2000 WL 1273637, at *4 (S.D.N.Y. Sept. 7, 2000) ("[T]he fact that the plaintiff alleges [in federal court] that the State court judgment was procured fraudulently does not remove his claims from the ambit of *Rooker-Feldman*." (quoting *Dockery v. Cullen & Dykman*, 90 F. Supp. 2d 233, 236 (E.D.N.Y. 2000)).

In clear contrast to the Second Circuit, both the Sixth and Seventh Circuit Courts of Appeals recognize exceptions to *Rooker-Feldman* where the underlying state court judgment was procured by fraud.

In *Nesses v. Shepard*, 68 F.3d 1003 (7th Cir. 1995), the plaintiff filed a federal civil rights action based on his claims that his state court suit had been dismissed as the result of a conspiracy between the judge and opposing counsel. The Court of Appeals for the Seventh Circuit held that *Rooker-Feldman* would not bar the plaintiff's claims, because the plaintiff claimed that people involved in the state court decision violated an independent right belonging to him —"

the right to be judged by a tribunal that is uncontaminated by politics." *Id.* at 1005.

Ulysses' complaint herein specifically alleged that the February 7, 2000 state court judgment was the product of an illegal conspiracy between Feldstein's counsel, the County Clerk and the state court law clerk. JA 1296-1297. Ulysses, like the plaintiff in *Nesses*, argued that it had a right to have its claims adjudicated by a "tribunal that is uncontaminated by politics." Unfortunately, it never got the chance, because the Second Circuit does not recognize a fraud exception to the *Rooker-Feldman* doctrine.

Like the Seventh Circuit, the Sixth Circuit also recognizes an exception to *Rooker-Feldman* when the state court judgment at issue "ha[s] been procured through fraud, deception, accident, or mistake . . ." *Catz v. Chalker*, 142 F.3d 279, 294 (6th Cir. 1998) (citing *Sun Valley Foods Co. v. Detroit Marine Terminals, Inc.*, 801 F.2d 186 (6th Cir. 1986) (quoting *Resolute Ins. Co. v. State of North Carolina*, 397 F.2d 586, 589 (4th Cir. 1968)).

In *Catz*, the district court applied *Rooker-Feldman* to dismiss plaintiff Catz's due process claims challenging the manner in which an Arizona state court judgment had been issued. The district court found, *inter alia*, that Catz's claims were "inextricably intertwined with the judgment of the Pima County Superior Court." *Id.* at 294. Catz had alleged that the state court "rulings were procured by a variety of due process violations, including failure to serve him, failure to give him notice of court dates at which his rights were lost, and improper collusion and *ex parte* contacts between [his adversary's] lawyers and the Arizona judiciary." *Id.* at 281.

The Court of Appeals reversed, because Catz's claims were "directed to the procedures used by the Arizona court, procedures that [the district court judge] found, if true, to be 'shocking'. Thus, permitting jurisdiction in this case does not contravene the heart of the *Rooker-Feldman* doctrine, the prohibition of reviewing the substance of state court judgments." *Id.* at 294; *accord*, *Sun Valley Foods v. Detroit*

Marine Terminals, Inc., 801 F.2d 186 (6th Cir. 1986) (noting that "[t]here is, however an exception to the general rule that precludes a lower federal court from reviewing a state's judicial proceedings. A federal court 'may entertain a collateral attack on a state court judgment which is alleged to have been procured through fraud, deception, accident, or mistake . . .'").

Like Catz, Ulysses alleged that the February 7, 2000 state court judgment was the product of "improper collusion and *ex parte* contacts" between Feldstein's counsel and the state court. Thus, in nevertheless affirming dismissal on the basis of *Rooker-Feldman*, the Second Circuit put itself in conflict with the Sixth and Seventh Circuits.

As demonstrated above, a clear conflict exists between the Second Circuit and the Seventh and Sixth Circuits regarding the question of whether federal courts should apply an exception to the *Rooker-Feldman* doctrine when the underlying state court judgment is the product of fraud, collusion or other wrongdoing. This conflict requires resolution by this Court, and the instant petition for certiorari should therefore be granted.

CONCLUSION

For the foregoing reasons, it respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York, New York
May 10, 2004

Respectfully submitted,

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